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No. 94-___

In The

Supreme Court of the United States

October Term, 1994

JEFFREY B. POMRANZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the venue clauses of the United States Constitution permit a prosecution under 18 U.S.C. § 924(c) for "us[ing] or carr[ying] a firearm" "during and in relation to any . . . drug trafficking crime" to be brought in any district in which the related "drug trafficking crime" may be prosecuted, as the Fifth Circuit held below, or only in a district where the firearm was "use[d] or carrie[d]," as the Ninth Circuit holds?

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LIST OF ALL PARTIES

* The caption of the case in this Court contains the names of all parties (petitioner Pomranz and the United States). Four co-defendants pleaded guilty. Petitioner stood trial and appealed alone. No one else joined in his petition to vacate sentence. Petitioner knows of no related cases.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JEFFREY B. POMRANZ respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on January 26, 1995, affirming the denial of his motion to vacate his conviction and sentence for carrying a firearm during and in relation to a conspiracy to distribute marijuana.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit was filed on January 26, 1995. It is published at 43 F.3d 156 and reprinted as Appendix A to this petition. The memorandum Order of the United States District Court for the Northern District of Texas (Mahon, J.) denying the Motion to Vacate Sentence is not published; it is reprinted as Appendix B. The opinion of the Fifth Circuit affirming petitioner's convictions and sentence on direct appeal is not published, but is noted at 904 F.2d 703 (table); Appx. E.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 26, 1995. Appx. D. The Court of Appeals' Order denying petitioner's petition for rehearing with suggestion for rehearing in banc was entered on March 13, 1995. Appx. C. This

petition is filed within 90 days of that date. Rule 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 924 of Title 18, United States Code, provides, in pertinent part:

> (c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years . . . . Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.
>
> (2) For purposes of this subsection, the term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) . . . .

18 U.S.C. § 924(c).

Article III, section 2, clause 3, of the Constitution of the United States provides, "The trial of all Crimes, except in cases of Impeachment, shall be by Jury; and such Trial shall be held in the state where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

The Sixth Amendment to the Constitution guarantees that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . . "

STATEMENT OF THE CASE

This petition arises from the denial of a motion to vacate the conviction and consecutive five-year sentence imposed on the petitioner, Jeffrey Pomranz, after a trial in the Northern District of Texas for carrying a firearm in Oklahoma City, Oklahoma, "during and in relation to" a marijuana distribution conspiracy that was being consummated in Dallas, Texas.

A. Procedural History

A federal grand jury sitting in the Northern District of Texas returned an indictment on December 7, 1988, charging the petitioner, Jeffrey B. Pomranz, in 61 counts with conspiracy to distribute marijuana, 21 U.S.C. § 846, and related offenses. Following a six-day jury trial, the

petitioner was convicted on March 10, 1989, on all 13 counts of a superseding indictment[1], charging conspiracy to distribute more than 1000 kilograms of marijuana, in violation of 21 U.S.C. § 846 (Count 1), unlawful use of a communication facility, in violation of 21 U.S.C. § 843(b) (Counts 2 and 51-53), interstate travel in aid of racketeering, in violation of 18 U.S.C. § 1952 (Counts 54-59), possession with intent to distribute, in violation of 21 U.S.C. § 841(b) (Count 60), and using or carrying a firearm, in violation of 18 U.S.C. § 924(c) (Count 61).

On May 12, 1989, the District Court sentenced the petitioner under the Sentencing Reform Act to 216-month concurrent prison terms on each of Counts 1, 2 and 51-60. On Count 61, the Court imposed a 60-month consecutive prison term, as required by § 924(c).[2] On direct appeal, the Fifth Circuit affirmed the judgment, by unpublished opinion, on May 22, 1990. *United States v. Pomranz*, 904 F.2d 703 (5th Cir.) (table); Appx. E. The petitioner's request for rehearing in that Court was denied on June 20, 1990; certiorari was not sought. The issues raised in the present motion under 28 U.S.C. § 2255 were not raised at or before trial, nor on appeal.

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[1] Counts 3 through 50 of the 61-count superseding indictment, filed February 8, 1989, were dismissed at government request. Petitioner was convicted, and eventually sentenced, on counts 1, 2, and 51-61.

[2] The court further imposed the five-year mandatory minimum term of supervised release and the mandatory $650 in special assessments. Due to the petitioner's lack of present or anticipated ability to pay, the court imposed no fine.

On August 24, 1992, the petitioner, represented by new (undersigned) counsel, filed a motion under 28 U.S.C. § 2255 to vacate his conviction and consecutive five-year sentence on Count 61. The attack on Count 61 was predicated on a lack of venue for the prosecution of the firearms offense in the Northern District of Texas, and related ineffective assistance of counsel.[3] Following briefing, Judge Mahon issued a 12-page Order on October 6, 1993. The district court denied relief on the Count 61 venue argument. Appx. B.[4]

On appeal, the Fifth Circuit (per R. Garza, J., with DeMoss and Benavides, JJ.) affirmed in a published opinion. Appx. A. The court held that "a defendant who is indicted for using or carrying a weapon in connection with a drug trafficking offense may be prosecuted and convicted for violating [18 U.S.C.] § 924(c)(1) in the same venue as the underlying drug offense." Appx. A13. The panel acknowledged that its holding was in direct conflict with a recent decision of the Ninth Circuit, *United States v. Corona*, 34 F.3d 876 (9th Cir. 1994). Appx. A7.

The court below denied a petition for rehearing, with suggestion for rehearing in banc, on March 13, 1995. Appx. C.

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[3] The motion also sought correction of illegal sentences imposed on Counts 2 and 51-59, and a correction of the judgment to show the correct date of arrest.

[4] The memorandum Order acknowledged and corrected the other errors noted in the defendant's motion. Accordingly, it was accompanied by an Amended Judgment.

B. Statement of Lower Court Jurisdiction Under Rule 14.1(i).

The district court's jurisdiction was properly invoked in this case under 28 U.S.C. § 2255, seeking to vacate the conviction and sentence on a count of an indictment over which the court had jurisdiction under 18 U.S.C. § 3231, in that the indictment alleged the commission of federal criminal offenses. The jurisdiction of the court below rested upon 28 U.S.C. §§ 1291, 2253 and 2255, and was timely invoked by Notice of Appeal filed within 60 days of the entry of the Order denying relief under § 2255. Fed.R.Gov. § 2255 Proc. 11.

C. Statement of Facts

The petitioner, Jeffrey Pomranz, was arrested on November 18, 1988, in Oklahoma City, Oklahoma, while making the final payment on a million-dollar, two-ton marijuana deal which proved to be a "reverse sting." He was found at that time to be carrying a firearm. Many of his and his co-conspirators' other activities had occurred in Northern Texas. As the court below noted, however, there was no evidence that he had ever used or carried the firearm in Texas, nor that the firearm had, for example, traveled to Oklahoma from Texas. Appx. A4.

The facts of the underlying criminal case were summarized below, quoting the district court, Appx. B3-B4, as follows:

> The evidence at trial established that during the months of October and November 1988, Defendant Pomranz met several times with Mike DeLaFlor, an undercover DEA agent in Fort

Worth, for the purpose of arranging the purchase of 4,000 pounds of marijuana. After several meetings in Texas and conversations on the phone, Pomranz and DeLaFlor agreed that the marijuana would be transported in two shipments of 2,000 pounds each at a total purchase price of $1.6 million, with $100,000.00 as front money, another $100,000.00 when the marijuana was delivered to the Dallas area, and then $400,000.00 to $800,000.00 after the marijuana was delivered to Pomranz.

The first payment of approximately $100,000.00 was made on November 12 by one of the men working for Pomranz. After having the marijuana shipment initially inspected in Dallas, Pomranz met DeLaFlor in Arlington, Texas, on November 17, 1988 and made the second $100,000.00 payment. That evening, DeLaFlor left for Oklahoma City to obtain the final payment from Pomranz. This payment was agreed to be made only after Pomranz received verification that the marijuana was in the hands of his people in Dallas.

On November 18, 1988, Pomranz arrived at the Oklahoma City motel in which DeLaFlor had taken a room. Before entering the motel, Pomranz secreted an automatic weapon in his jacket and then proceeded to DeLaFlor's room carrying a box containing more than $400,000.00. Pomranz and DeLaFlor then waited in the motel room for word that the marijuana had changed hands. After the marijuana was transferred, the authorities arrested several of

> Pomranz's co-conspirators in Texas, and then Pomranz himself in Oklahoma.

Appx. A3-A4, 43 F.3d at 157-58.

REASON FOR GRANTING THE WRIT

The decision below squarely conflicts with that of another circuit on the important Constitutional criminal venue question presented.

The Fifth Circuit's decision below, in conflict with that of the Ninth Circuit on the same issue, gives insufficient weight to the criminal defendant's constitutional right to be tried only in the proper venue and fails to apply this Court's cases. Petitioner was indicted and tried in the Northern District of Texas for conspiracy to distribute marijuana, possession of marijuana with intent to distribute, and related offenses. Count 61 of the superseding indictment in this case charged:

> On or about November 18, 1988, [the defendant] did unlawfully use and carry a firearm, that is, a Raven, Model P-25, .25 caliber handgun, serial number 640102, *in Oklahoma City, Oklahoma*, during and in relation to a drug trafficking crime occurring in the Northern District of Texas and elsewhere, as alleged in Count 1 and Count 60 of this indictment.

(emphasis added). The evidence presented at trial showed that the petitioner possessed the gun in Oklahoma City at the time of his arrest on November 18, 1988, as alleged in the indictment. There was no evidence, however, that he even possessed, much less that he "use[d] or carr[ied]," the gun at any time at any place

within the District of prosecution, nor that he had transported it from Northern Texas to Oklahoma. Accordingly, venue for Count 61 was not properly laid in the District where the indictment was returned. The court below, upholding the denial of petitioner's motion under 28 U.S.C. § 2255, erred in holding otherwise, where the Ninth Circuit would have reversed. The writ should be granted to resolve this conflict in the circuits and to direct the lower courts in their application of the constitutional right to proper venue.

Prosecution in the wrong venue requires vacatur of a conviction on the affected count. Such errors are cognizable not only on pretrial motion, at trial, and on direct appeal, but also in a motion to vacate pursuant to 28 U.S.C. § 2255, because venue error violates a fundamental right which is protected not only by the rules of procedure, but also by the words of the Constitution itself. Donald E. Wilkes, Jr., Federal and State Post-Conviction Remedies and Relief § 4-6, at 138 & n.14 (2d ed. 1992). Indeed, even in the most restrictive days of habeas corpus jurisdiction, enforcement of venue rights was a common basis for seeking such relief. *E.g.*, *Rumely v. McCarthy*, 250 U.S. 283 (1919); *Brown v. Elliott*, 225 U.S. 392 (1912); *Haas v. Henkel*, 216 U.S. 462 (1910); *Hyde v. Shine*, 199 U.S. 62 (1905).

The lower court's decision appears to be predicated on a "public policy" rationale, rather than the required constitutional analysis. The opinion suggests that permitting cases charging violations of 18 U.S.C. § 924(c) only to be prosecuted where the prohibited act occurred would "effectively undermine the Congressional intent to curb the violence inherently associated with high level drug

deals." Appx. A12. The panel even suggests that gun-toting drug dealers "could routinely escape the [five-year consecutive] penalty envisioned by Congress" and that the statutory tool "would be left impotent." Appx. A12-A13. This alarming rhetoric would miss the mark as a method for ascertaining the demands of the Bill of Rights even if true.

The decision below recognizes, as it must, that our original Constitution, as well as the Bill of Rights, guarantees that a federal criminal offense may be prosecuted only where that crime "shall have been committed." U.S. Const., art. III, § 2, cl. 3; amend. VI. Appx. A5. Another panel of the Fifth Circuit has noted aptly that the venue right hearkens back in our history even further than the Constitution:

> [A] defendant may not be taken to far distant places for trial, as the Declaration of Independence charged King George III with doing. Article III of the Constitution mandates that the trial be held in the state where the crime was committed. The sixth amendment refined that requirement to provide that the criminal trial must be held in the district in which the alleged crime occurred.

In re Chesson, 897 F.2d 156, 158 (5th Cir. 1990) (per curiam). In holding that "a defendant who is indicted for using or carrying a weapon in connection with a drug trafficking offense may be prosecuted and convicted for violating [18 U.S.C.] § 924(c)(1) in the same venue as the underlying drug offense[,]" Appx. A13, the decision below denigrates that right and subordinates it to the interest in prosecutorial efficiency.

The question presented in this petition is where the offense of using or carrying a firearm during and in relation to a drug trafficking crime, 18 U.S.C. § 924(c), is "committed," within the meaning of those provisions of the Constitution. The court below discussed the legislative history of § 924(c)'s enactment and amendment, to show that Congress intended this statute as a powerful deterrent to the use of firearms in connection with drug trafficking and crimes of violence. Appx. A8-A10. Nothing in that history, however, suggests that Congress intended to vary the traditional venue rules for § 924(c) cases. Nor could it, since those rules are constitutional in stature and cannot be changed legislatively. As this Court has recognized, "[Q]uestions of venue are more than matters of mere procedure. 'They raise deep issues of public policy in the light of which legislation must be construed.' *United States v. Johnson*, [323 U.S. 273,] 276 [(1944)]." *Travis v. United States*, 364 U.S. 631, 634 (1961).

This Court has not addressed the rules for determining venue in some 30 years, and the fundamental errors in the decision below suggest that the lower courts are in need of further guidance. *Cf. Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245-46 (1964) (apparently this Court's most recent venue case; correcting an error that should have been clear under many earlier cases). As this Court unanimously has explained, where "the statute [defining the charged offense] does not indicate where Congress considered the place of committing the crime to be, . . . the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States v. Anderson*, 328 U.S. 699, 703 (1946).

Where a question arises as to the proper venue, and neither the statute defining the offense nor any statute establishing venue rules provides a clear answer, "it is the [district where the criminal act is done] which determines" venue. *Id.* at 705; accord, *Johnston v. United States*, 351 U.S. 215, 220-21 (1956) (discussing venue for crimes of omission). As Professor Wright explains, quoting a leading commentator, the "essential verb usually contains the key to the solution of the question: In what district was the crime committed?" 2 Charles A. Wright, Federal Practice and Procedure: Criminal § 302, at 196 (1982). Accord, *United States v. Georgacarakos*, 988 F.2d 1289, 1293 (1st Cir. 1993) ("To determine venue, we examine 'the key verbs in the statute defining the criminal offense' to find the scope of relevant conduct.") (internal citation omitted). The court below failed to apply this previously well-settled rule for applying the Constitutional venue clauses.

Contrary to the implicit theory of Count 61, as pled, venue lies where the criminal act was committed, not where the act's impact was expected to be felt or where the entire criminal episode had its center of gravity. Nor is this a case in which the gun was "used or carried" in more than one district. Illustratively, in *United States v. Scaife*, 749 F.2d 338, 346 (6th Cir. 1984), the court of appeals separately analyzed a Hobbs Act conspiracy count and a § 924(c) gun count and found that venue had been proper in the Western District of Tennessee for the trial of both. The Circuit found that venue for the conspiracy had been proper, because certain coconspirators "entered the conspiracy [in that district]" and "several overt acts in furtherance of the conspiracy were performed" there. 749 F.2d at 346. Rather than proceed to

hang venue for the gun count on the hook of that conspiracy count, the Court then stated that the reason venue for the gun count had been proper was that "the alleged unlawful carrying of firearms began [in the district of trial]." *Id.*[5] See generally *United States v. Freeman*, 239 U.S. 117 (1915); *Haas v. Henkel*, 216 U.S. 462, 474 (1910).

In affirming the denial of the motion to vacate conviction and sentence on Count 61, the decision below fails to follow, or even to acknowledge, this Court's fundamental venue rule. The verb element of 18 U.S.C. § 924(c) is "uses or carries"; the prepositional phrase "during and in relation to any . . . drug trafficking crime" serves to limit the circumstances under which a person can be convicted under this statute for "using or carrying a firearm." While this limitation is critically important, it does not expand the proper venues. The requirement that the jury must find the commission of the underlying drug offense does not involve any verb, much less the "essential verb[s]," in this statute. The commission of the underlying drug offense is not the action element of a section 924(c) offense, but merely defines when the carrying (or use) of a weapon is a federal offense. For this reason, the only other circuit directly to have addressed this issue

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[5] Petitioner would readily concede that a § 924(c) offense could in theory extend into more than one district. In such a case, there would be a "continuing offense," and venue would be proper in any of the districts where the gun was used or carried. 18 U.S.C. § 3237(a). Here, however, the act of using or carrying the gun was not alleged in the indictment to have occurred anywhere but in Oklahoma, nor did the government prove at trial that any use or carrying of the gun occurred in the Northern District of Texas.

holds that a § 924(c) case may only be prosecuted where the firearm was actually used or carried. *United States v. Corona*, 34 F.3d 876 (9th Cir. 1994). The Fifth Circuit erred in not taking its lead from that precedent.

In *Corona*, the defendant was prosecuted in the District of Nevada on a four count indictment. One count charged a drug conspiracy; the other three charged substantive offenses committed in connection with that conspiracy, two of which alleged actual distributions, while the fourth count arose under 18 U.S.C. § 924(c), as in this case, charging the related carrying of a firearm. The acts constituting the offenses charged in the three substantive counts all occurred in California; the conspiracy had been formed in Nevada, and some overt acts had occurred there. The defendant challenged venue on all counts. On appeal, the government sought to defend the venue for the substantive counts by analogy to the *Pinkerton* principle – co-conspirators' responsibility for one another's crimes foreseeably committed in furtherance of shared conspiratorial objectives.[6] In an opinion by Judge Trott, the Ninth Circuit correctly upheld the conspiracy conviction against this attack[7] but reversed the convictions on the three substantive counts, including the § 924(c) firearms charge, on venue grounds, and remanded for dismissal. 34 F.3d at 878-81.

Since each count carries its own venue, counts which are otherwise properly joined in a single indictment sometimes may not be triable in the same district, just as

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[6] See *Pinkerton v. United States*, 328 U.S. 640 (1946).

[7] See *Hyde v. Shine*, 199 U.S. 62, 76-77 (1905).

co-defendants may not always be triable together. The venue right only comes into play when a defendant objects to the prosecutor's choice of venue; thus, enforcement of the right inherently engenders increased cost and inefficiency in prosecution. It is the public policy of the United States, as expressed twice in our Constitution, that these costs are the necessary and bearable side effects of this protection for the people from governmental overreaching. The lower court's "public policy" analysis in this case thus impermissibly disagrees with the underlying rationale of the venue right itself.

When this Court referred in *United States v. Anderson*, 328 U.S. 699, 703 (1946), to "the nature of the crime alleged" as a factor in venue analysis, it was not inviting a judicial inquiry into the relative importance of different criminal laws, as the court below implies, Appx. A13, but rather was referring to such questions directly bearing on venue as whether the offense was a continuing one or was a crime of omission. See *United States v. Cores*, 356 U.S. 405, 408 (1958) (statute making it unlawful for alien to "remain" in U.S. after visa expires describes continuing offense which may be prosecuted wherever alien is found).[8] The lower court's discussion of the nature and

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[8] Compare, *e.g.*, *United States v. Lombardo*, 241 U.S. 73 (1916) (venue for offense of failing to file a certain form with the Commissioner of Immigration lies exclusively in Washington, D.C.; contrary to government's contention, offense does not "continue" into D.C. from district where defendant was located but failed to mail the report, where indictment had been brought), with *Armour Packing Co. v. United States*, 209 U.S. 56, 73-77 (1908) (Congress may provide for prosecution of continuing offense of prohibited transportation in any district through which transport occurs).

purpose of prosecutions under § 924(c) is therefore immaterial to the question of venue, that is, the question of *where* the offense was "committed."

In any event, the lower court's expressed fears are unfounded. Even accepting the Congressional judgment that another would-be marijuana dealer might not be deterred from his activities by petitioner Pomranz's 18-year, nonparolable sentence on the other counts, but would be deterred by learning of his total 23-year sentence, there was nothing to prevent the government from prosecuting the petitioner in the Western District of Oklahoma, instead of in Northern Texas, on the conspiracy and gun counts. That would have generated the maximum combined sentence with a single prosecution. Assuming that achieving the most severe sentence was the government's goal – which is for the executive branch authorities to decide, not any court – it is certainly not good constitutional decisionmaking to create a new and undefined venue doctrine to protect the prosecutors from the consequences of their own errors in one particular case.

Venue cannot properly be based on the government's proof of intent or relationship alone. Article III and the Sixth Amendment require that the defendant be tried in the district where the crime was "committed." Proof of the underlying conspiracy is an element of and related to the substantive offense when *Pinkerton* liability is invoked in precisely the same way that commission of the predicate drug crime is a requirement for conviction under section 924(c), but (as the Ninth Circuit reasoned in *Corona, supra*) it is not the case that any and all substantive offenses committed in furtherance of the conspiracy

could be prosecuted in any district where the conspiracy could be charged. Thus, even though proof of an underlying drug offense is a legal predicate to conviction under § 924(c), that predicate does not provide the venue for the gun charge.

Finally, the court below attempted to bolster its decision by denigrating the significance of the Constitutional right to proper venue. That right is not entitled to "less deference than other constitutional rights." Appx. A15. As this Court emphasized in *Caplin & Drysdale, Chtd. v. United States*, 491 U.S. 617, 105 L.Ed.2d 528, 543 (1989), "there is no such distinction between, or hierarchy among, constitutional rights." The lower court attempted to support its position by suggesting that "venue questions" are treated "differently from other constitutional rights and other elements of crimes." Appx. A15. This dictum is both misleading[9] and unsupportive of the point the panel makes. Contrary to the lower court's suggestion in this case, the right to proper venue cannot be more "seriously infringe[d]," *id.*, than by a trial in a district where the crime was not "committed."

The rationale and result reached by the court below in petitioner's case are directly contrary to this Court's decision in *United States v. Midstate Horticultural Co.*, 306

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[9] For example, while the right to proper venue can be waived by silence, that silence is binding only when it results from a knowing and intelligent, counseled decision. In this regard, the venue right is no different from most other constitutional rights, including the Fifth Amendment self-incrimination privilege, which is ordinarily waived if not affirmatively invoked. 1 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 8.10(e), at 683 (1984).

U.S. 161 (1939). There, the defendant was prosecuted in the Eastern District of Pennsylvania for paying a rebate in New York "in connection with the transportation of goods [three years earlier] from California through [Eastern Pennsylvania] to New Jersey," *id.* at 163-64, in violation of the Elkins Act. The part of the statute in question made it an offense "to offer, grant, or give . . . any rebate, concession, or discrimination in respect to the transportation of any property in interstate commerce by any common carrier . . . . " In a unanimous opinion by Justice Black, this Court upheld the dismissal of that indictment on constitutional venue grounds, notwithstanding a provision of the Elkins Act that arguably conferred jurisdiction (*i.e.*, venue) in any district "through which the transportation may have been conducted." *Id.* at 164.

Recognizing that Congress could not, by law, confer jurisdiction "in any District wherein a violation was not committed" within the meaning of Article III or the Sixth Amendment, 306 U.S. at 165, the Court therefore construed the statute not to permit such prosecutions. The relationship between the payment of the rebate, an act which occurred wholly within New York, and the transportation (at what amounted, in light of the rebate, to an unfiled, and therefore unlawful, rate) was held not to be a proper basis for venue in any of the places where the related continuing conduct occurred, because that was not where the offense of "grant[ing a] rebate" was "committed." Similarly, in the instant case, the petitioner's carrying of a firearm in Oklahoma City "during and in relation to" the drug conspiracy in which he was participating in Texas was a criminal act that could, for the same

reasons, only be prosecuted in the Western District of Oklahoma.

The government overreached in this indictment by attempting to try in a Texas federal court an offense "committed," in the Constitutional sense, in Oklahoma. The lower court erred, where the Ninth Circuit would not have, in affirming the denial of the petitioner's motion to vacate sentence, limited to the consecutive five year term on Count 61. For these reasons, a writ of certiorari should be granted.

CONCLUSION

For the foregoing reason, petitioner JEFFREY POMRANZ prays that this Court grant his petition for a writ of certiorari, vacate the judgment below, and remand with instructions to vacate the conviction and sentence on Count 61.

Respectfully submitted,
LAW OFFICES OF ALAN ELLIS, P.C.

PETER GOLDBERGER
Counsel of Record
PAMELA A. WILK

Attorneys for Petitioner

June 12, 1995.

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Jeffrey B. POMRANZ,
Defendant-Appellant.

No. 93-9135.

United States Court of Appeals,
Fifth Circuit.

Jan. 26, 1995.

Pamela A. Wilk, Peter Goldberger, Ardmore, PA, for appellant.

J. Michael Worley, Asst. U.S. Atty., Paul E. Coggins, U.S. Atty., Fort Worth, TX, for appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before REYNALDO G. GARZA, DeMOSS and BENAVIDES, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:

Jeffrey B. Pomranz (the "appellant") was convicted on March 10, 1989, by a jury on all thirteen counts of a superseding indictment.[1] Count one of the indictment charged the appellant with conspiracy to distribute over

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[1] On December 7, 1988, a grand jury indicted Pomranz in sixty-one counts for conspiracy to distribute marihuana and other drug-related offenses. Counts three through fifty of the sixty-one count superseding indictment were dismissed at the government's request.

1000 kilograms of marihuana in violation of 21 U.S.C. § 846; counts two and fifty-one through fifty-three charged unlawful use of a communication facility in violation of 21 U.S.C. § 843(b); counts fifty-four through fifty-nine charged interstate travel in aid of racketeering in violation of 18 U.S.C. § 1952; count sixty charged aiding and abetting the possession with intent to distribute marihuana in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; and count sixty-one charged unlawful use of a firearm during a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1).

On May 12, 1989, the district court sentenced Pomranz under the Sentencing Reform Act to 216 month concurrent prison terms on each of counts one, two and fifty-one through sixty. On count sixty-one, the court imposed a 60 month consecutive prison term, as required by § 924(c)(1). The court further imposed a five-year mandatory minimum term of supervised release and a mandatory $650 in special assessments. This Court affirmed the judgment on May 22, 1990, in *United States v. Pomranz*, 904 F.2d 703 (5th Cir.1990) (table).

Pomranz filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, alleging for the first time that venue was improper in his conviction on count sixty-one of the superseding indictment. He also alleged that his counsel was ineffective for failing to ever raise that issue. Pomranz appeals the lower court's decision denying the requested relief. For the reasons below we affirm.

FACTS

The district court adequately summarized the facts of this case as follows:

> The evidence at trial established that during the months of October and November 1988, Defendant Pomranz met several times with Mike DeLaFlor, an undercover DEA agent in Fort Worth, for the purpose of arranging the purchase of 4,000 pounds of marijuana. After several meetings in Texas and conversations on the phone, Pomranz and DeLaFlor agreed that the marijuana would be transported in two shipments of 2,000 pounds each at a total purchase price of $1.6 million, with $100,000 as front money, another $100,000 when the marijuana was delivered to the Dallas area, and then $400,000 to $800,000 after the marijuana was delivered to Pomranz.
>
> The first payment of approximately $100,000 was made on November 12 by one of the men working for Pomranz. After having the marijuana shipment initially inspected in Dallas, Pomranz met DeLaFlor in Arlington, Texas, on November 17, 1988 and made the second $100,000 payment. That evening, DeLaFlor left for Oklahoma City to obtain the final payment from Pomranz. This payment was agreed to be made only after Pomranz received verification that the marijuana was in the hands of his people in Dallas.
>
> On November 18, 1988, Pomranz arrived at the Oklahoma City motel in which DeLaFlor had taken a room. Before entering the motel, Pomranz secreted an automatic weapon in his jacket and then proceeded to DeLaFlor's room

> carrying a box containing more than $400,000. Pomranz and DeLaFlor then waited in the motel room for word that the marijuana had changed hands. After the marijuana was transferred, the authorities arrested several of Pomranz's co-conspirators in Texas, and then Pomranz himself in Oklahoma.

The 2255 motion is directed at count sixty-one of the indictment, which reads as follows:

> On or about November 18, 1988, [the appellant] did unlawfully use and carry a firearm, that is, a Raven, Model P-25, .25 caliber handgun, serial number 640102, in *Oklahoma City, Oklahoma*, during and in relation to a drug trafficking crime occurring in the Northern District of Texas and elsewhere, as alleged in Count [one] and Count [sixty] of this indictment.

(emphasis added). Evidence was presented at trial showing that Pomranz possessed the gun in Oklahoma City at the time of his arrest on November 18, 1988, as alleged in the indictment. However, no evidence was presented to indicate that Pomranz used or carried the weapon at any time within the Northern District of Texas, or that he transported the weapon from Texas to Oklahoma.

DISCUSSION

The appellant asserts that venue on count sixty-one was improper because the § 924(c)(1) charge could be prosecuted only where the firearm was "used" or "carried," i.e., in Oklahoma. Although the issue was never raised at trial or on direct appeal, Pomranz further argues that waiver of a good venue defense must be knowing

and intelligent on the part of the defendant. In addition, Pomranz claims that his counsel's failure to raise the alleged venue defense proves he was afforded ineffective assistance of counsel. Because this Court finds that venue was proper, the appellant's conviction is affirmed.

Venue law

Article III, section 2, clause 3 of the United States Constitution provides that "The Trial of all Crimes, except in Cases of Impeachment, shall be . . . held in the State where the said Crimes shall have been committed. . . . " The Sixth Amendment expands this rule and expresses it as a right of the accused by providing that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . . " U.S. CONST. amend. VI. In addition, the Federal Rules of Criminal Procedure ensure this constitutional right by providing that "[e]xcept as otherwise permitted by statue [sic] or by these rules, the prosecution shall be had in a district in which the offense was committed." FED.R.CRIM.P. 18. These provisions reflect that in criminal cases the question of venue is not a legal technicality, instead, it is a significant matter of public policy. *United States v. Johnson*, 323 U.S. 273, 276, 65 S.Ct. 249, 250-51, 89 L.Ed. 236 (1944).

Congress has provided that:

> [A]ny offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of or prosecuted in any district in

> which such offense was begun, continued or completed.

18 U.S.C. § 3237(a). Furthermore, venue in conspiracy cases is proper in any district where the agreement was formed or where an overt act in furtherance of the conspiracy was performed. *United States v. Caldwell*, 16 F.3d 623, 624 (5th Cir.1994); *United States v. Winship*, 724 F.2d 1116, 1125 (5th Cir.1984).[2] Since, a conspiracy to distribute marihuana is a continuing offense under section 3237,[3] venue may lie in any district where an overt act was committed.

In light of the conspiracy law, Pomranz does not contend that he was improperly tried for the conspiracy count in the Northern District of Texas since overt acts occurred there. He further agrees that he was properly tried in Texas for the other substantive offenses that he committed while in that state. However, Pomranz affirmatively claims that the constitution guarantees his right to be tried in Oklahoma for the substantive offense under § 924(c) because the weapon was carried only in that

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[2] The Supreme Court approved this rule despite its dilutent effect upon venue rights, permitting trials of defendants in district where they have never set foot. *Winship*, 724 F.2d at 1125 (citing *Hyde v. United States*, 225 U.S. 347, 32 S.Ct. 793, 56 L.Ed. 1114 (1912)).

[3] "A continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy. Where such an act or series of acts runs through several jurisdictions, the offense is committed and cognizable in each." *United States v. Midstate Horticultural Co.*, 306 U.S. 161, 166, 59 S.Ct. 412, 414, 83 L.Ed. 563 (1939) (quoting *Armour Packing Co. v. United States*, 153 F.1, 5-6 (8th Cir.1907)).

state, not Texas. Appellant argues that the conspiracy venue should not automatically extend to the substantive offense and consequently, an independent venue analysis should be conducted regarding that offense. Pomranz supports his argument with *United States v. Corona*, 34 F.3d 876 (9th Cir.1994).

In *United States v. Corona*, the defendant was tried and convicted in the state of Nevada for conspiracy to distribute narcotics and the substantive crimes arising from the conspiracy – distribution of cocaine and use of a firearm during drug trafficking. The substantive crimes occurred in California only, while overt acts in furtherance of the conspiracy were committed in both California and Nevada. The defendant argued on appeal that venue was improper laid in Nevada for the substantive offenses.

In light of these claims, the Ninth Circuit decided that a court must conduct a separate venue analysis for the substantive crimes and the conspiracy, even if the substantive crimes were committed in furtherance of the conspiracy. *Id.* at 879 (citing *United States v. Jordan*, 846 F.Supp. 895, 898 (D.Nev.1994)). Due to this analysis, the Court determined that venue was improper in Nevada for the prosecution of the substantive offenses. More specifically, it concluded that a conviction under § 924(c) could not be prosecuted where the conspiracy venue lay if the weapon was also not used or carried in that venue. For the reasons discussed below, we disagree with the conclusion drawn on that count.

Section 924(c)

Congress enacted Section 924(c) as part of the Gun Control Act of 1968, Pub.L. 90-618, 82 Stat. 1213, in the wake of the assassinations of Martin Luther King and Robert Kennedy, as part of a comprehensive response to the "increasing rate of crime and lawlessness and the growing use of firearms in violent crime." *United States v. Correa-Ventura*, 6 F.3d 1070, 1084 (5th Cir.1993) (quoting H.R.Rep. No. 1577, 90th Cong., 2d Sess. 7 (1968), *reprinted in* 1968 U.S.S.C.A.N. 4410). Since then, the original version of § 924 has been modified several times to deal with modern concerns. The current version of section 924 provides in pertinent part:

> (c)(1) [w]hoever, *during and in relation to any* crime of violence or *drug trafficking crime . . . uses or carries a firearm, shall,* in addition to the punishment provided for such crime of violence or drug trafficking crime, *be sentenced to imprisonment for five years. . . . Notwithstanding any other provision of law,* the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, *nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment* including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

18 U.S.C. § 924 (emphasis added). This Court interpreted the statute to mean that the mere carrying or use of a firearm was not the criminal *actus reus* prohibited by the statute, instead it was the employment of the weapon in the context of another predefined crime. *Correa-Ventura*, 6 F.3d at 1083 (the "essence" of the offense was that a

criminal defendant used a firearm in committing another federal crime). Congress specifically intertwined the penalty provisions of § 924 with the underlying offense in order to alleviate fears that a person could be convicted for carrying a weapon if he was not involved in a drug trafficking offense (or violent crime). *Id.* at 1084. Thus, only the act of carrying a weapon "during and in relation to . . . [a] . . . drug trafficking crime" is a substantive offense under § 924(c)(1).

In *Correa-Ventura,* we also noted that a "common thread throughout the amendments to Section 924(c) [was] the consistent increase in deterrence value." *Id.* For example, after the Supreme Court decided that a Section 924(c) penalty could not be layered onto a predicate statute containing its own enhancement provision,[4] Congress responded by amending the statute to make clear its intent that the defendant be sentenced under both enhancement schemes, thus maximizing the punishment. Comprehensive Crime Control Act of 1984, Pub.L. No. 98-473, § 1005, 98 Stat. 1837, 2138-39. *See also* S.Rep. No. 225, 98th Cong., 1st Sess. 312-15 (1983) *reprinted in* 1984 U.S.S.C.A.N. 3182, 3490-92. The statute underwent further changes to increase the severity of punishment for this offense by: (1) requiring that the mandatory sentence run *consecutively* rather than *concurrently* with that of the predicate crime, (2) substantially increasing the mandatory penalties for violations, and (3) denying parol or probation privileges during the 924(c) sentence. *Correa-*

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[4] *See Simpson v. United States,* 435 U.S. 6, 16, 98 S.Ct. 909, 915, 55 L.Ed.2d 70 (1978); *Busic v. United States,* 446 U.S. 398, 404, 100 S.Ct. 1747, 1752, 64 L.Ed.2d 381 (1980).

Ventura, 6 F.3d at 1084-85 (internal citations omitted). It remains patently clear then, that Congress intended this section to act as a maximum deterrence against using firearms in connection with other crimes. *Id.* at 1083.[5]

Overt Acts

In order to properly reach a decision, this Court must not only examine the language of the statute and the purpose behind it, we must also review the overt acts committed by the defendant during the underlying drug transaction. An overt act, is an act performed to effect the object of a conspiracy, although it remains separate and distinct from the conspiracy itself. Though the act need not be of a criminal nature, it must be done in furtherance of the object of the conspiracy. However, if the act constitutes a substantive crime, the defendant may be prosecuted for both the conspiracy offense *and* the substantive crime as separate crimes. *Iannelli v. United States*, 420 U.S. 770, 777, 95 S.Ct. 1284, 1289-90, 43 L.Ed.2d 616 (1975).

In this case, various acts were committed in furtherance of the drug conspiracy. For instance, after the initial contact between Pomranz and agent DeLaFlor: telephone conversations ensued between the parties to finalize the drug transaction, Pomranz traveled from Oklahoma to Texas to personally discuss the illegal activity, plans to inspect a sample of the marihuana before the

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[5] The legislation's sponsor, Representative Poff, stated that a primary objective of the provision was to "persuade the man who is tempted to commit a Federal felony to leave his gun at home." 114 CONG.REC. 22,231 (1968).

actual purchase were consummated, installments on the total purchase price were made and most crucial to this analysis, Pomranz carried a weapon during and in relation to delivery of the final drug payment. Unquestionably, the primary reason that Pomranz carried a weapon was to protect or further the drug transaction by ensuring the safe delivery of the drug money.

This situation is not altogether different from cases where this Court held that the proximity of a weapon to the drugs was proof that the weapon involved could have been used to protect or have the potential of facilitating the operation, and that the presence of the weapon was connected with the drug trafficking. *See, e.g., United States v. Featherson*, 949 F.2d 770, 776 (5th Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1698, 118 L.Ed.2d 408 (1992); *United States v. Blake*, 941 F.2d 334, 342-43 (5th Cir.1991), *cert. denied*, ___ U.S. ___, 113 S.Ct. 596, 121 L.Ed.2d 533 (1992). In those cases, the proximity of the weapon to the drugs constituted a violation of § 924(c)(1). Likewise, in such a high-level drug operation as the one before us,[6] the proximity of the weapon to the drug money also constitutes a violation of this section. The use of firepower to protect the money involved in the drug trafficking simply increased the likelihood that the aim of the conspiracy would be accomplished.

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[6] The evidence adduced at trial did not only establish the leadership role played by Pomranz, it also revealed the sophisticated nature of the criminal enterprise. The marihuana smuggling ring employed safe houses to store the contraband, several vehicles to transport it, false driver's licenses, handheld radios, surveillance detection equipment and of course, at least one firearm.

Public Policy

If, as Pomranz argues, venue was improper in Texas, an immensely undesirable result would have ensued. It would have necessitated that the government gather its resources and conduct an entirely new trial in Oklahoma to ensure that the appellant receive a consecutive five year sentence for carrying a weapon during the drug transaction. This in turn, would have required the government to duplicate its efforts and once again lay the foundation for the firearm offense, i.e., establish the elements of the conspiracy to distribute over 1000 kilograms of marihuana since it must prove that the firearm was carried or used during and in relation to a drug trafficking offense.[7] The end result of such action would impede the administration of justice because the government would be left with a difficult decision: expend its limited resources in prosecuting the felon a second time for this separate offense, or satisfy itself with the punishment previously imposed and forfeit a conviction on the weapons's count.

If the latter choice were elected, it would effectively undermine the Congressional intent to curb the violence inherently associated with high level drug deals. Defendants like Pomranz could routinely escape the penalty

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[7] The main problem we are faced with is the fact that a prosecution for carrying or using a firearm cannot be bifurcated from the underlying drug crime. In the case at bar, because the penalty provisions of § 924(c)(1) are intertwined with the predicate crime, the defendant must first be proven guilty of the conspiracy to distribute marihuana before proceeding with the § 924 offense. Thus, the need to re-establish a conspiracy arises.

envisioned by Congress, i.e., the five year consecutive sentence, when their illegal activities transversed multiple state boundaries. A tool designed by the Legislature to combat and deter the violence on the nation's streets would be left impotent. Public policy dictates that such an outcome be avoided. Moreover, the highest Court has instructed us that venue "be determined from the *nature of the crime alleged* and the location of the act or acts constituting it." *United States v. Anderson*, 328 U.S. 699, 703, 66 S.Ct. 1213, 1216, 90 L.Ed. 1529 (1946) (emphasis added).

The crime before us deals with the use of a weapon "during and in relation to . . . [a] . . . drug trafficking crime." Its nature is primarily designed to prevent the violence associated with the *consummation of drug transactions* (and other violent crimes). Section 924(c)(1) is a distinct offense that affirmatively supplements and maximizes punishment for the use of a weapon in the underlying offense. In addition, the acts involved in the predicate drug offense were peppered within two districts. In light of the nature of § 924(c) and the location of the acts involved, we hold that a defendant who is indicted for using or carrying a weapon in connection with a drug trafficking offense may be prosecuted and convicted for violating § 924(c)(1) in the same venue as the underlying drug offense.[8]

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[8] Pomranz also claims that *United States v. Davis*, 666 F.2d 195 (Former 5th Cir.1982), authoritatively establishes for this Circuit that the venue for the conspiracy charge does not dictate the venue for a related substantive charge. In *Davis*, this Court reversed the district court's finding of proper venue in the Middle District of Georgia on the substantive charge of possession with intent to distribute methaqualone, despite the fact that

In this case, the underlying drug trafficking offense was a conspiracy to distribute marihuana: an offense which may be prosecuted in any district where an overt act was performed. Carrying a firearm to protect the delivery of drug money was an overt act committed "during and in relation to" the drug conspiracy. Consequently, a violation of section 924(c)(1) should be tried in any district where the underlying conspiracy venue was proper, namely Oklahoma or Texas.

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it had upheld the propriety of venue there on the related conspiracy count.

The Court stated that "the government had the burden of proving that the conspirators had both possession of and the intent to deliver the methaqualone at the time [the defendants] were in the Middle District of Georgia. This burden was not met since neither [of the defendants] actually or constructively possessed the methaqualone in question until [they] arrived in Florida." *Id.* at 200. (internal citations omitted). We agree with appellant that in *Davis*, due to the facts and the *specific crimes* with which the defendants were charged, that venue for the substantive offense had been improper in the Middle District of Georgia. *Davis*, however, is distinguishable from the case before us.

Although the cases appear to be similar, the substantive counts in question were based on different statutes and that is where the difference lies. The clear language of § 924 and the Congressional purpose behind it differentiates it from other offenses, including possession with intent to distribute a narcotic. Due to the specific nature of this crime and the difficulties inherently involved in prosecuting it, the government must be allowed to try the defendant in the district where the act was committed, or in a district where venue would properly lie for the underlying drug crime. Therefore, since this case is centered on an entirely different statutory offense, our holding is not in conflict with *Davis*.

The initial predicate necessary for a violation of § 924(c)(1) is a crime of violence or drug trafficking. It is only when a firearm is used or carried during and in relation to such violent or drug trafficking crime that the § 924(c)(1) offense becomes complete. Since the indispensable predicate offense is as important or essential to the completed offense as the carrying or using of the firearm and since the use or carrying of the firearm itself must be made during and in relation to such predicate offense, it only follows that venue should be allowed where the violent crime or drug offense occurred. Thus, a firearm may be used in one state but it does not preclude a commission of a § 924(c)(1) offense in another state.

Moreover, we do not believe that our holding seriously infringes on the defendant's rights since this Court treats the right to venue with less deference than other constitutional rights. For example, this Court has commented that

> *[a]lthough venue is a constitutional right and an element of every crime, and despite the Supreme Court's command that it not be treated as a formality, courts have dealt with venue questions differently from other constitutional rights* and other elements of crimes. For instance, the standard for finding a waiver of venue is much more relaxed than the rigorous standard for finding waivers of the right to trial by jury, the right to confront one's accusers or the privilege against compulsory self incrimination. As opposed to waiver of these later rights, a defendant can waive venue rights by his silence – just by his failure to lodge an objection prior to trial.

United States v. Winship, 724 F.2d 1116, 1125 (5th Cir.1984) (internal citations omitted) (emphasis added).

Because we find that venue was proper in the Northern District of Texas for the § 924 violation, we need not address appellant's remaining points of error. The denial of his 2255 motion on the basis of venue is affirmed.

CONCLUSION

For the reasons discussed above, we find that venue was proper in the Northern District of Texas for appellant's violation of § 924(c)(1). Therefore, we affirm the mandatory five year consecutive imprisonment term imposed on the appellant.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA	§	
VS.	§	4:92-CV-626-E
	§	4:88-CR-184-E
JEFFREY B. POMRANZ	§	

ORDER

(Filed Oct. 6, 1993)

Now before the Court is the petition of Defendant, Jeffrey B. Pomranz, for habeas review under 28 U.S.C. § 2255, his motion for correction of the Court's records pursuant to Fed. R. Crim. P. 36, and the Government's responses thereto. After careful consideration of the motions, the record and the applicable law, the Court makes the following determination.

FACTS

Jeffrey Pomranz was convicted on March 10, 1989, on Counts 1, 2 and 51-61 of a superseding indictment charging the following: conspiracy to distribute more than 1,000 kilograms of marijuana, in violation of 21 U.S.C. § 846 (Count 1); possession with intent to distribute 1000 kgs of marijuana and aiding and abetting such possession in violation of 21 U.S.C. § 841(a)(1) (Count 60); unlawful use of a communication facility, in violation of 21 U.S.C. § 843(b) (Counts 2 and 51-53); interstate travel in aid of racketeering, in violation of 18 U.S.C. § 1952 (Counts 54-59); and using or carrying a firearm, in violation of 18

U.S.C. § 924(c) (Count 61). On May 12, 1989, the Court sentenced Mr. Pomranz under the Sentencing Reform Act to a total of 216 months for Counts 1, 2 and 51-60. These counts are grouped under § 3D1.2, U.S.S.G., all sentences to run concurrently. On Count 61, the Court imposed a 60-month consecutive prison term, as required by § 924(c). The Court further imposed the five-year mandatory minimum term of supervised release and the mandatory $650.00 special assessment but imposed no fine.

The judgment of this Court was affirmed on direct appeal on May 22, 1990. *United states v. Pomranz*, 904 F.2d 703 (5th Cir. 1990) (table). Defendant now raises the following issues:

(1) Venue did not lie in the Northern District of Texas for the firearms charge pursuant to 18 U.S.C. § 924(c).

(2) Defendant received ineffective assistance of counsel pertaining to defense counsel's failure to move for dismissal of firearms count based on improper venue.

(3) The Court's imposition of a 216 month term of imprisonment for each of Counts 2 and 51-59 was improper because such a sentence exceeds the statutory maximum penalty for these particular offenses.

(4) Finally, though not a ground for relief under § 2255, defendant requests that the Court exercise its power under Fed. R. Crim. P. 36 to order that certain corrections be made on the docket so that the Bureau of Prisons can use the corrected information to grant the defendant proper credit for time served.

DISCUSSION

GROUND 1

Petitioner's first argument under § 2255 asserts that his conviction and consecutive sentence on Count 61, for using a firearm during a drug trafficking crime, should be reversed and vacated because venue was improper in the Northern District of Texas. For the following reasons, the Court finds that this argument is without merit and the requested relief should be denied.

First, the Court finds that venue for the firearms charge was, indeed, proper in the Northern District of Texas. Count 61 of the superseding indictment against Mr. Pomranz alleged violation of 18 U.S.C. § 924(c) in that the defendant was alleged to have knowingly used a firearm during or in relation to the commission of either the crime alleged in Count 1 or Count 60 of the indictment. Count 1 alleged an on-going marijuana distribution conspiracy which included overt acts occurring in the Northern District of Texas and the Western District of Oklahoma. Count 60 alleged the possession of marijuana in the Northern District of Texas with the intent to distribute, for which Mr. Pomranz was made culpable as a co-conspirator and as an aider and abettor.

The evidence at trial established that during the months of October and November 1988, Defendant Pomranz met several times with Mike DeLaFlor, an undercover DEA agent in Fort Worth, for the purpose of arranging the purchase of 4,000 pounds of marijuana. After several meetings in Texas and conversations on the phone, Pomranz and DeLaFlor agreed that the marijuana would be transported in two shipments of 2,000 pounds

each at a total purchase price of $1.6 million, with $100,000.00 as front money, another $100,000.00 when the marijuana was delivered to the Dallas area, and then $400,000.00 to $800,000.00 after the marijuana was delivered to Pomranz.

The first payment of approximately $100,000.00 was made on November 12 by one of the men working for Pomranz. After having the marijuana shipment initially inspected in Dallas, Pomranz met DeLaFlor in Arlington, Texas, on November 17, 1988 and made the second $100,000.00 payment. That evening, DeLaFlor left for Oklahoma City to obtain the final payment from Pomranz. This payment was agreed to be made only after Pomranz received verification that the marijuana was in the hands of his people in Dallas.

On November 18, 1988, Pomranz arrived at the Oklahoma City motel in which DeLaFlor had taken a room. Before entering the motel, Pomranz secreted an automatic weapon in his jacket and then proceeded to DeLaFlor's room carrying a box containing more than $400,000.00. Pomranz and DeLaFlor then waited in the motel room for word that the marijuana had changed hands. After the marijuana was transferred, the authorities arrested several of Pomranz's co-conspirators in Texas, and then Pomranz himself in Oklahoma.

Mr. Pomranz was found guilty of participating in an on-going marijuana distribution conspiracy. The evidence also showed that Pomranz took a leadership role in this enterprise. The conspiracy involved overt acts in both the Northern District of Texas and the Western District of Oklahoma. This marijuana smuggling ring was very

sophisticated, employing safe houses for storage of the marijuana, several vehicles, false drivers licenses, hand-held radios, surveillance detection equipment and firearms. The evidence established that the firearm found on the defendant when he was arrested was one of the tools used in furtherance of the conspiracy to possess and distribute the marijuana in question.

The right of a criminal defendant to be tried in the state and district in which the crime occurred is protected by both the Constitution and Federal Rules of Criminal Procedure. *See* U.S. Const., art. III § 2 & 6th Amend; Fed. R. Crim P. 18. The Supreme Court has stated that where "the statute [defining the charged offense] does not indicate where Congress considered the place of committing the crime to be, . . . the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States v. Anderson*, 328 U.S. 699, 703 (1946). In order to deal with crimes which were perpetrated in more than one state or district, Congress passed 18 U.S.C. § 3237 which provides that venue for a continuing offense is in "any district in which such offense was begun, continued, or completed." A continuing offense is "a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy. *United States v. Davis*, 666 F.2d 195, 199 n. 5 (5th Cir. 1982).

The firearms charge in Count 61 requires proof of two distinct elements requiring action on the part of the defendant. The defendant had to have been found to have committed one of the underlying drug offenses of which he was charged, and he must have been found to have

used or carried a firearm in relation to the commission of one of these underlying crimes. A conviction is impossible if either of the two elements is absent.[1] The jury in Mr. Pomranz' case found him guilty of both Counts 1 and 60 and also found the defendant guilty of the firearms charge in Count 61.

Based on the elements of the offense and the facts of this case, the Court finds that the charge of using or carrying a firearm in relation to a drug trafficking crime is a continuing offense, as it relates to 18 U.S.C. § 3237. The Court finds that the criminal offense was, in fact, a continuous series of acts brought about by a single impulse. Necessary elements of the offense were committed both in the Northern District of Texas and in Oklahoma. As the offense under Count 61 of the superseding indictment was begun and continued in the Northern District of Texas, the Court finds that venue was proper in the Northern District of Texas.

Second, the Court finds that even if venue was not proper in the Northern District of Texas, the defendant has waived any objection to venue being exercised in this district. It is uncontested that the defendant's motion, filed well over a year after the trial in this case, raises the issue of improper venue for the first time in these proceedings. Normally, any allegation regarding a defect in venue must be raised either prior to trial, or at the latest, at the close of the prosecution's case in chief. *Kitchen v.*

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[1] In fact, the use or carrying of a firearm alone may not constitute culpable behavior. It is only when the firearm is carried in relation to a drug trafficking offense that the behavior is sanctioned by this statute.

United States, 532 F.2d 445, 446 (5th Cir. 1976); *United States v. Dryden*, 423 F.2d 1175, 1178 (5th Cir. 1970). While as a general matter, waiver of objections should not be readily inferred, in many, if not most cases in which the defendant fails to object to a venue defect, the defendant's silence properly implies a waiver of any objections to venue. *United States v. Stratton*, 649 F.2 1066, 1078 (5th Cir. 1981). Case law identifies two instances when such an inference is warranted: (1) when the defect of venue is clear from the information in the indictment or from statements of the prosecution; and (2) when at the conclusion of the prosecutor's case, grounds for acquittal are stated but the issue of venue is not raised. *U.S. v. Menendez*, 612 F.2d 51, 55 (2d Cir. 1979).[2]

The defendant argues that venue was not proper in the Northern District of Texas as to the charge of the use of a weapon in a drug transaction. Defendant argues that although the underlying drug transaction occurred in Oklahoma and Texas, the Government only put on evidence of defendant's possession and use of the firearm being in the state of Oklahoma. Thus, they argue, the criminal act occurred in Oklahoma only and, thus, venue was not proper in Texas. Count 61 of the superseding indictment provided as follows:

> On or about November 18, 1988, [petitioner] did unlawfully use and carry a firearm, that is, a Raven, Model P-25, .25 caliber handgun, serial

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[2] Some courts articulate a general rule of waiver of objections to venue defects if no objection is made before trial, with a narrow exception when the venue defect is not clear on the face of the indictment. *U.S. v. Turley*, 891 F.2d 57 (3d Cir. 1989).

> number . . . , in Oklahoma City, Oklahoma, during and in relation to a drug trafficking crime occurring in the Northern District of Texas and elsewhere, as alleged in Count 1 and Count 60 of this indictment.[3]

The Court finds that the basis upon which the defendant argues a defect of venue in his trial is clear and unambiguous on the face of the indictment. Thus, it is fair to infer that there was a knowing waiver of this defect. Additionally, there is nothing in the record of the criminal proceedings, either before, during, or after trial, that indicated that the defendant had any concern regarding the fairness of his being tried in Texas on the firearms charge.

Accordingly, the Court finds that a waiver may justifiably be inferred from the defendant's failure to raise an objection to venue on the firearms charge, and the Court does so in this instance. Thus, even if the defendant's venue claim had merit, the Court finds that the defendant waived his objection thereto by failing to raise this issue until over one year after his conviction.

Accordingly, the Court finds that the defendant's argument regarding venue is without merit and the defendant's motion pursuant to § 2255 in this regard should be denied.

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[3] Count 1 alleged a continuing marijuana distribution conspiracy occurring in the Northern District of Texas and elsewhere, in violation of 21 U.S.C. § 846. Count 60 alleged the possession of marijuana in the Northern District of Texas with the intent to distribute, in violation of 21 U.S.C. 841(a)(1).

GROUND 2

In the alternative, Defendant Pomranz argues that his counsel's failure to raise the venue issue, as to the firearms charge, at trial constitutes ineffective assistance of counsel. In order to be successful on his claim of ineffective assistance of counsel, the defendant must show that (1) his counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for his counsel's unprofessional errors, the proceedings would have had a different result. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). The Court finds that, based on its ruling that venue for Count 61 was proper in the Northern District of Texas, there is no basis for the claim that the representation afforded by the defendant's counsel either fell below an objective standard of reasonableness or that the failure to raise the argument now presented by defendant would have changed the outcome of the case.

Accordingly, the Court finds that the defendant's claim of ineffective assistance of counsel is without merit and his motion under § 2255 in this regard should be denied.

GROUND 3

The defendant next argues that the sentences assessed by the Court on Counts 2 and 51-59 of the superseding indictment were improper. For the following reasons, the Court finds that although the change will not affect the total amount of time served by the defendant, the Court is of the opinion that the more appropriate method of addressing defendant's contention in ground 3

is to amend the judgment to reflect the sentences imposed on Counts 2 and 51-60.

At sentencing, this Court imposed a sentence of 216 months, announced in a cumulative fashion as a total prison term for Counts 1, 2 and 51-60 after the offenses were grouped as part of a common scheme, pursuant to § 3D1.2, U.S.S.G. The guideline range for these grouped offenses was 188-235 months. Count 1, which was the conspiracy count of the indictment, and Count 60 which was the possession count, each had a statutory maximum of life imprisonment and the guideline range of 188-235 months. The Court's sentence of 216 months properly fell within the guideline range for each of these offenses. While Counts 2 and 51-59 were included under the grouping by common scheme pursuant to § 3D1.2, Section 5G1.1(a) of the U.S.S.G. provides that when the statutory maximum for an offense is less than the minimum of the guideline range, the statutory maximum *shall be* the guideline sentence for that offense.

Counts 2 and 51-53 charged the unlawful use of a communication facility in violation of 21 U.S.C. § 843(b). Each count carried a 48 month statutory maximum term. Counts 54-59 charged violations of the Travel Act, in violation of 18 U.S.C. § 1952. Each of these counts carries a 60-month statutory maximum term. Accordingly, pursuant to Section 5G1.1(a) of the U.S.S.G. the guideline sentence for each of Counts 2 and 51-53 is 48 months and the sentence directed by the guidelines for each of Counts 54-59 is 60 months, all of which run concurrently with the sentence of 216 months imposed as to Counts 1 and 60 of the indictment. *See* § 5G1.2(c) U.S.S.G.

For clarification, the Court finds that an amended judgment should be entered in this action to reflect the following:

> The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 18 years (216 months) on Count 1; 18 years (216 months) on Count 60 to run concurrently with Count 1; four years (48 months) on each of Counts 2 and 51 through 53, to run concurrently with each other and with Counts 1 and 60; and 5 years (60 months) for each of Counts 54 through 59, to run concurrently with each other and with Counts 1, 60, 2, and 51 through 53. It is further ordered that the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 5 years (60 months) on Count 61; the sentence herein imposed on Count 61 is to run consecutively to the sentences imposed in Counts 1, 2, and 51 through 60. This sentence produces a total custody sentence of 23 years (276 months).

The Court, therefore, enters herewith an amended judgment reflecting this clarification.

GROUND 4

Finally, the defendant requests the Court to correct an alleged error in the Court's records, pursuant to Fed. R. Crim. P. 36. Defendant claims that the cover sheet of the Court's docket incorrectly reflects November 25, 1988 as the date of defendant's arrest rather than November 18, 1988, the true date of defendant's arrest. From a review of the records the Court finds that defendant was

arrested in Oklahoma on November 18, 1988. He was then transferred to the Fort Worth Division, Northern District of Texas on November 25, 1988, which is the date defendant came into the custody of the officials in this district and first appeared before the Magistrate in this Court.

CONCLUSION

In conclusion, the Court finds that Grounds 1 and 2 of defendant's motion under § 2255 are without merit and ORDERS that the relief sought therein is hereby DENIED.

It is further ORDERED that with regard to Ground 3, an amended judgment should be entered to clarify defendant's sentence under the guideline.

Concerning Ground 4, the Court finds that defendant was arrested on November 18 and has been in continuous confinement since that date. It is further ORDERED that the Clerk of the Court send a copy of this Order to the U.S. Bureau of Prisons for the purpose of providing them with this information.

It is so ORDERED.

Signed this 6th day of October, 1993.

/s/ Eldon B. Mahon
ELDON B. MAHON
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-9135

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JEFFREY B. POMRANZ,
a/k/a Chuck,
a/k/a Larry,
a/k/a Robert Stephens,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 01/26/95, 5 Cir., 1995, (___) F.3d (___)

(March 13, 1995)

Before REYNALDO G. GARZA, DeMOSS and BENAVIDES, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the

Court having requested that the Court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

/s/ Reynaldo G. Garza
United States Circuit Judge

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-9135

D.C. Docket No. 4:92-CV-626-E (4:88-CR-184-E)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JEFFREY B. POMRANZ,
a/k/a Chuck,
a/k/a Larry,
a/k/a Robert Stephens,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

Before REYNALDO G. GARZA, DeMOSS and BENAVIDES, Circuit Judges.

JUDGMENT

(Filed Jan. 26, 1995)

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

January 26, 1995

ISSUED AS MANDATE: MAR 21 1995

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-1448

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JEFFREY B. POMRANZ,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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(May 22, 1990)

Before BROWN, JOLLY and DAVIS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:*

Jeffrey B. Pomranz was convicted on one count of conspiracy to distribute and possess with intent to distribute more than 1,000 kilograms of marijuana in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 846, and 18 U.S.C.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

§ 2; one count of aiding and abetting the possession with intent to distribute more than 1,000 kilograms of marijuana in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; two counts of using a communication facility in a drug trafficking offense in violation of 21 U.S.C. §§ 843(b) and (c); six counts of using interstate travel in aid of racketeering in violation of 18 U.S.C. § 1952; and one count of using a firearm in a drug trafficking offense in violation of 18 U.S.C. § 924(c). He appeals his conviction and sentence, alleging various grounds of error. After reviewing the record in this case, we find no merit to any of the grounds alleged and therefore affirm the judgment of conviction on all counts.

I

In July 1988, FBI Agent Clinton Brown was introduced to an informant, "Benny," who was allegedly involved with the appellant, Jeffrey Pomranz, in importing marijuana into the United States from Mexico. On July 20, 1988, another FBI agent introduced Benny to Mike DeLaFlor, a DEA agent in Fort Worth. On August 4, 1988, Brown and DeLaFlor arranged for Benny to telephone Pomranz, who operated out of Oklahoma City. DeLaFlor spoke to Pomranz during this initial call and a second time that day and arranged to meet him in Dallas the following day. During their meeting in a Dallas hotel on August 5, Pomranz, who identified himself as "Chuck," stated that in spite of paying $80,000 in bribes to Mexican officials, he was having difficulty importing ten tons of marijuana into the United States from Mexico. DeLaFlor, who claimed to have his own drug transport network, offered to contact his Mexican relatives to assist

Pomranz in importing the drugs; in the event he was unsuccessful, DeLaFlor offered to supply Pomranz with marijuana through his own business. Pomranz agreed.

On October 5, 1988, DeLaFlor and Pomranz met at a restaurant in Arlington, Texas. DeLaFlor informed Pomranz that he was unable to assist him with the delivery of the ten tons of marijuana from Mexico. When Pomranz stated he needed 1,400 to 4,000 pounds of marijuana, DeLaFlor offered to provide him with the requested amount. The two agreed to meet again the following day. On October 6, DeLaFlor and Pomranz met at another Arlington restaurant and then went for a drive in DeLaFlor's car to discuss their business transaction. During their conversation, which was taped, the two agreed that, as a first step, one of Pomranz' employees would come to Texas to inspect a sample of DeLaFlor's marijuana. On October 26, DeLaFlor telephoned Pomranz that the sample was ready for inspection in McAllen, Texas. On November 2, 1988, Pomranz informed DeLaFlor he would send "George" to inspect the drugs. On November 3, 1988, DeLaFlor picked up "George," who was later identified as William Zavasky, Jr., at the Dallas airport. DeLaFlor then drove Zavasky to view the marijuana sample. Zavasky inspected the sample, which consisted of approximately 500 pounds of marijuana in cellophane packages, by cutting open some of the packages and smelling their contents.

On November 10, DeLaFlor again met Pomranz in Dallas. In another taped conversation, Pomranz confirmed the terms of the deal: he would buy 4,000 pounds of marijuana to be transported in shipments of 2,000 pounds each; he agreed to pay $1.6 million, with $100,000

as front money, another $100,000 when the marijuana was delivered to the Dallas area, and then $400,000 to $800,000 after the marijuana was delivered to him. If the deal succeeded, Pomranz stated he would consider purchasing up to ten tons of marijuana a week from DeLaFlor. In a taped conversation later that day, Pomranz stated that he wanted to expedite matters in the hope that they could do "at least three trips of four thousand [pounds]" before the winter holidays. Pomranz stated that he would send "Chris," who was later identified as Clifford King, to Dallas with the $100,000 front money.

On November 12, DeLaFlor met King at an Arlington restaurant. They then went to King's truck, where DeLaFlor was given a cardboard box containing U.S. currency. A bank count subsequently determined that the box contained $98,610.

DeLaFlor and Pomranz talked by telephone on November 14 and November 16 and arranged for Zavasky to come to Dallas to inspect the delivery of marijuana. On November 17, DeLaFlor and Pomranz met at an Arlington restaurant. Pomranz gave DeLaFlor a maroon briefcase, containing approximately $100,000. The two then drove to another restaurant where they met Lunt and Zavasky. Lunt then took Zavasky to examine the marijuana. Again, Zavasky cut open some of the packages of a shipment of 2,300 pounds of marijuana, and examined their contents.

That evening, as planned, DeLaFlor left for Oklahoma City to obtain the third payment from Pomranz, to be paid upon confirmation of the delivery of the marijuana from Lunt to Zavasky in Dallas the following day.

On November 18, Pomranz arrived at DeLaFlor's motel. After leaving his vehicle, Pomranz placed an automatic weapon in his jacket and proceeded to DeLaFlor's room carrying a red bag and a white box containing more than $400,000. DeLaFlor and Pomranz then waited in DeLaFlor's motel room for the phone call from Lunt and Zavasky confirming that the transfer of the marijuana had occurred.

Meanwhile, back in Dallas, Lunt and Zavasky proceeded with the transfer of the marijuana. After meeting at a restaurant around 12:30 p.m., Lunt, Clifford King, and Officer Craig Hopper drove to the site where the marijuana was stored. Together with undercover DEA Agent Doug Ligon, who was already at the site, they loaded the marijuana into the camper that had been specially outfitted by Pomranz and his co-defendants to transport the drugs. Agent Lunt testified that, during loading, King stood inside the camper and directed the amount of marijuana that was placed in the vehicle and its position therein. Although the warehouse contained 2,300 pounds of marijuana, King and the agents loaded only 1,998 pounds.

Lunt and King then returned to the restaurant in Lunt's car where they met Zavasky and informed him that the transfer was complete. Lunt telephoned DeLaFlor in Oklahoma City who then signaled other agents to arrest Pomranz. Additionally, Lunt contacted Hooper and Ligon and directed them to drive the loaded camper to the restaurant parking lot. After arriving at the restaurant, Hooper handed the camper's keys to Lunt who gave them to King. When Zavasky, who had left the restaurant

to pick up a driver of one of the camper's escort cars, returned, the arrests commenced.

On December 7, 1988, a grand jury indicted Jeffrey B. Pomranz on one count of conspiracy to distribute and possess with the intent to distribute more than 1,000 kilograms of marijuana in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 846, and 18 U.S.C. § 2; fifty counts of knowingly and intentionally using a communication facility in the commission of this conspiracy, in violation of 21 U.S.C. §§ 843(b) and (c) and 18 U.S.C. § 2; six counts of traveling or conspiring to travel in interstate commerce with the intent to promote an unlawful business enterprise, in violation of 18 U.S.C. §§ 1952(a) and 2; one count of aiding and abetting the possession with the intent to distribute more than 1,000 kilograms of marijuana in violation of 18 U.S.C. § 841(a) (1) and 18 U.S.C. § 2; and one count of unlawfully using a firearm in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c). Also indicted in connection with these charges were Terry Metcalf, Robert Holloway, Clifford King, and William Zavasky, Jr.

On December 22, 1988, Pomranz pleaded not guilty. On February 14, 1989, Pomranz filed a pretrial motion seeking disclosure of the identity of the government's confidential informant. On February 23, 1989, the district court denied the motion, holding that Pomranz failed to show that the informant's testimony would significantly aid in establishing his defense, entrapment. On March 1, the government dismissed all but two of the counts regarding Pomranz' use of a communication facility in the commission of the conspiracy.

Trial commenced on March 1, 1989. At the close of the government's case, Pomranz moved for a judgment of acquittal on the ground of insufficient evidence. He also moved for a mistrial on the ground that the government's failure to call three of his co-defendants after asserting during the voir dire and in its opening statement that all four co-defendants would testify violated his right under the Confrontation Clause. Pomranz also reurged his motion that the government be required to produce its confidential informant.

The district court denied Pomranz' motion for a judgment of acquittal. The court ultimately denied the defendant's motion for a mistrial; however, it first permitted the government to reopen its case in order to procure the testimony of the three co-defendants it had not called. When the government declined the offer, the court issued a cautionary instruction to the jury to disregard any statements by the prosecutor concerning these co-defendants' testimony. Finally, in response to the defendant's motion that it compel the disclosure and production of the government's confidential informant, the court ordered the government to ascertain whether the informant was within its subpoena power. Subsequently, the government informed the court that it was unable to determine the informant's whereabouts and there the matter ended.

The jury found Pomranz guilty on all counts. The district court sentenced Pomranz to 276 months in prison and a five-year term of supervised release and imposed a special assessment of $650. Pomranz filed a post-trial motion for a mistrial and a judgment of acquittal. In his motion for a mistrial, Pomranz again argued that the

government's failure to call three co-defendants after informing the jury that they would testify violated his right under the Confrontation Clause; additionally, he argued that the court erred by giving a lesser included offense instruction on the possession count and by failing to require production of the government's informant. In his motion for a judgment of acquittal, Pomranz again argued that the evidence was insufficient to support his conviction. The district court denied these motions and entered a final judgment on May 4, 1989. Pomranz timely appealed.

III

On appeal, Pomranz argues that the district court erred in seven respects: 1) by failing to instruct the jury that the quantity of marijuana is an element of the offense and, hence, must be proved by the government beyond a reasonable doubt; 2) by instructing the jury that, if it found him not guilty of possession of more than 1,000 kilograms of marijuana, it could convict him of the lesser included offense of possession of less than 1,000 kilograms but more than 100 kilograms of marijuana; 3) by denying his motion for a judgment of acquittal with respect to the possession charge on the ground that the evidence was insufficient to support that conviction; 4) by denying his motion for a mistrial on the ground that his Sixth Amendment right under the Confrontation Clause was violated when the government, during the voir dire and in its opening statement, suggested that all four of his co-defendants would testify at trial and then subsequently failed to call three of them; 5) by denying his motion to compel the production of a government

informant; 6) by refusing to adjust his sentence for acceptance of responsibility because he exercised his right to a jury trial; and 7) by unconstitutionally imposing a $650 dollar special assessment.

A

Pomranz argues, first, that the district court erred by failing to instruct the jury that the quantity of marijuana the indictment alleged he conspired to and, in the aid of others, did possess was an element of the offense that the government was required to prove beyond a reasonable doubt.

We have held that the quantity of narcotics, as defined under 21 U.S.C. § 841(b)(1), is not an element of an offense proscribed under §§ 841(a)(1) and 846, but rather is a penalty provision; as such, it need only be proved to the sentencing judge by a preponderance of the evidence. *U.S. v. Brown*, 887 F.2d 537, 540 (5th Cir. 1989); *U.S. v. Morgan*, 835 F.2d 79, 81 (5th Cir. 1987).

B

Second, Pomranz argues that, assuming the district court correctly refused to instruct the jury that quantity is an element of the offense, it necessarily erred by instructing the jury that, in the event it acquitted him of possession of more than 1,000 kilograms of marijuana, it could still convict him of the lesser included offense of possession of less than 1,000 kilograms but more than 100

kilograms of marijuana.[2] Pomranz argues that he was prejudiced by this erroneous jury instruction because, but for it, he might have been acquitted of aiding and abetting the possession of more than 1,000 kilograms of marijuana. Moreover, Pomranz argues that this error was compounded by the court's failure to issue a lesser included offense instruction as to the conspiracy count in that the court thereby signalled to the jury its belief that the government had proved both that he conspired to possess and, in fact, did possess the greater amount.

Because quantity is not an element of the offense, the court may have incorrectly given a lesser included offense instruction on the possession count; nevertheless,

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[2] The district court's instructions were based upon § 21 U.S.C. §§ 841(b)(1)(A)(vii) and 841(b)(1)(B)(vii). Section 841(b)(1)(A)(vii) provides in relevant part:

> (b) Penalties
>
> Except as otherwise provided in section 845a, or 845b of this title, any person who violates subsection (a) of this section shall be sentenced as follows:
>
> (vii) 1,000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight . . . such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . .

Section 841(b)(1)(B) (vii) provides in relevant part:

> (B) In the case of a violation of subsection (a) of this section involving –
>
> (vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight- . . . such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years . . .

any error was harmless. Pomranz' argument that, but for the lesser included offense instruction, he would have been acquitted of aiding and abetting the possession of more that 1,000 kilograms is purely speculative; ultimately, the speculative argument is discredited by the fact that there is more than ample evidence to support the jury's verdict convicting him of this charge, based on King's constructive possession of the 2,300 pounds in the warehouse. See *infra*. Pomranz' argument that the court erred in failing to provide a similar lesser included offense instruction on the conspiracy charge is likewise meritless since no reasonable version of the evidence would have supported such an instruction. The evidence presented at trial demonstrates irrefutably that Pomranz conspired to purchase from DeLaFlor at least 4,000 pounds of marijuana.

C

Third, Pomranz argues that the district court erred by denying his motion for a judgment of acquittal on the ground that the evidence was insufficient to support his conviction for aiding and abetting the possession of more than 1,000 kilograms of marijuana. Pomranz argues that the evidence is incontrovertible that the camper contained only 1,998 pounds of marijuana, which is less than 1,000 kilograms.[3]

In order to prove possession with the intent to distribute, the government must establish that a defendant had knowledge, possession of a controlled substance, and

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[3] One kilogram is approximately 2.2 pounds.

specific intent to distribute it. Possession, however, may be either actual or constructive. Constructive possession is "the knowing exercise of, or the knowing power or right to exercise dominion and control over the proscribed substance." *U.S. v. Kaufman*, 858 F.2d 994, 1000 (5th Cir. 1988).

When we review the evidence in the light most favorable to the government, as we must, there clearly is sufficient evidence from which the jury could have concluded beyond a reasonable doubt that Pomranz aided and abetted the possession of more than 1,000 kilograms of marijuana. Although King and the DEA agents loaded only 1,998 pounds of marijuana into the camper, 2,300 pounds (or 1045.45 kilograms) of marijuana were available in the warehouse for loading, awaiting only King's word of whether it should be loaded or should remain in the warehouse. Thus, the jury, which had been instructed concerning constructive possession, could have found that King who, Lunt testified, controlled both the amount of marijuana that went into the camper and its placement within the vehicle, had "the knowing power or right to exercise dominion and control" over more than 1,000 kilograms of marijuana. The evidence is clear that King worked for and at the direction of Pomranz, who thus clearly aided and abetted in the constructive possession of *all* the marijuana located in the warehouse.

D

Fourth, Pomranz argues the district court erred by denying his motion for a mistrial on the ground that the government's failure to call three of his co-defendants

after asserting that it would do so during the voir dire[4] and in its opening statement[5] violated his Sixth Amendment right under the Confrontation Clause. We disagree.

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[4] During the voir dire, the prosecutor stated:
"I expect that another type of witness the United States will present are people named in this indictment, charged in this indictment as having participated in this same offense. I expect they will testify. They will testify under what is known as a plea agreement describing what affect the prosecution has on them. All those matters will be disclosed to you. There will be nothing that could possibly held from you. But, again, the question: When you know that somebody is testifying and you know all the facts and you hear all the facts and you are in that position, is there anything about the fact that the government has made a deal, as long as you know what the deal is and can see every piece of it, does anybody have an opinion that you just can't go any further beyond that point?"

[5] In his opening argument, the prosecutor stated:
"You will also hear testimony from Terry Brent Metcalf, Robert Edward Holloway, Clifford Anthony King and William James Zavasky, Jr., all four of those of those individuals will testify.
As I explained during the voir dire, they will be testifying under agreements they reached with the United States with respect to their prosecution. All of the details of that will be displayed before you. There won't be anything hidden, any questions you'll have when it's all over. You'll know what they're facing. You will know what they have gotten and you can have all of that to value whatever testimony they have presented to you.
In a nutshell, I believe that puts together the case that the United States will present through the various

Frazier v. Cupp, 89 S.Ct. 1420 (1969) guides our holding in the instant case. In *Frazier*, the Court held that the prosecutor's summary of the testimony of a prospective witness who was not required to testify because of his assertion of his Fifth Amendment rights, did not violate the defendant's right under the Confrontation Clause. The Court emphasized that the summarized testimony was "not a vitally important part of the prosecutor's case," was testimony that the prosecutor "reasonably expected to produce," and was not "touted to the jury as a crucial part of the prosecutor's case." *Frazier*, 89 S.Ct. at 735-736 (1969). Additionally, it cited the trial court's issuance of a limiting instruction.

Unlike *Frazier*, in the instant case, the prosecutor did not even summarize the co-defendants' testimony but merely stated that they would testify. Additionally, the district court issued a cautionary instruction to the jury to ignore the prosecutor's statements concerning the co-defendants' testimony. Finally, the evidence of Pomranz' guilt was so overwhelming that we can discern no prejudice to his case from the alleged prosecutorial indiscretion.

E

Fifth, Pomranz argues that the district court erred by denying his motion for a mistrial on the ground that the government failed to produce a confidential informant

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witnesses. It will describe the conspiracy, the execution of the search warrants, money involved, and the participation of the other defendants."

and, thereby, violated his Sixth Amendment right to confront the witnesses against him. Pomranz argues this error was prejudicial because, through the informer, he would have been able to establish the defense of entrapment.

Applying the analysis of *Roviaro v. United States*, 77 S.Ct. 623 (1957), we hold that the district court did not err by denying Pomranz' motion for a mistrial on the ground that the government failed to produce its confidential informant. Under *Roviaro*, the government need only disclose the identity of a confidential informant where disclosure would be "relevant and helpful to the defense of the accused, or is essential to a fair determination of a cause . . . " *Roviaro*, 77 S.Ct. at 628. Although *Roviaro* is to be applied on a case-by-case basis, we have held that where an informer is not an "integral participant" in a drug transaction, disclosure is not required. *U.S. v. Diaz*, 658 F.2d 580, 588 (5th Cir. 1981).

The evidence adduced at trial showed that the informant, referred to as Benny or Horace L. Benson, did not play an integral role in the circumstances surrounding the offense: after meeting Agents Clinton Brown and DeLaFlor in July 1988, Benny telephoned Pomranz at DeLaFlor's behest on August 4 to introduce DeLaFlor to Pomranz. Thereafter, although Benny continued to provide information to the federal agents on Pomranz throughout August and September 1988 and telephoned Pomranz on November 17 to wish him luck on the deal, there is no evidence that he participated in any way in the negotiations or preparations concerning the drug transaction. We find that Benny's role was essentially that

of an "introducer" and hold that his minimal involvement did not require his disclosure. *See Id.*

F

Sixth, Pomranz argues that, in refusing to deduct two levels from his sentence for acceptance of responsibility, the district court effectively penalized him for exercising his right to a jury trial. He cites the following remarks by the district court as evidence:

> "THE COURT: Well, I'm having real problems in saying that a person under the guidelines would be entitled to two points on accepting responsibility when he goes through – when he's arrested and goes through a lengthy trial; and on the eve of sentencing almost, he come in and files a statement saying, I'm sorry. And it's an excellent letter. It's a well-written letter.
>
> In my review, in the Court's review – and if you have any other authority – I mean, in every case that would occur. We would never have a case that that wouldn't occur. They will always want to come in and say the day of sentencing or a week or two before sentencing I'm sorry. I do not understand that as the intent nor, in reading the background of the sentencing guidelines, that that was what was intended in accepting responsibility."

Later, the court stated:

> "THE COURT: Most of the ones that I know of, that we have had any experience with, they have accepted that responsibility before they are ever indicted. Cooperating, telling what they did from the very onset, from the first arrest,

> that's accepting responsibility. I mean, that's what usually occurs. And, certainly, no one can be punished for going to trial, but I don't see – I'm just having problems with saying this is the method by which a person accepts responsibility.

Viewed in context, we hold that the foregoing remarks do not indicate that the district court penalized Pomranz for exercising his right to a jury trial by refusing to adjust his sentence for acceptance of responsibility. On April 21, 1989, only three weeks before his sentencing, the court received a letter from Pomranz in which he expressed a newly realized contrition for his actions. We view the district court's statements as a refusal to credit the sincerity of this professed acceptance of responsibility, made on the eve of sentencing; and, it was on this basis that the court declined to award a downward adjustment.

Commentary Application Note 1(g) of § 3E1.1 of the Sentencing Guidelines expressly authorizes the district court to consider "the timeliness of the defendant's conduct in manifesting the acceptance of responsibility" in deciding whether to award a downward adjustment. Moreover, the record indicates that the district court twice disclaimed any intent to penalize Pomranz for having exercised his right to a jury trial.

Ultimately, the district court's finding concerning a defendant's acceptance of responsibility is to be accorded "great deference and should not be disturbed unless it is without foundation." Sentencing Guidelines § 3E1.1, Commentary Application Note 5. We therefore decline to

upset the court's finding concerning Pomranz' failure to accept responsibility for his crime.

G

Pomranz next argues that the Sentencing Guidelines violate due process because they permit a sentencing judge to impose sentence based on factors, such as the quantity of narcotics, that were not proved beyond a reasonable doubt at trial. We have previously rejected this argument. *See U.S. v. Casto*, 889 F.2d 562, 569-570 (5th Cir. 1989).

Finally, Pomranz argues that the $650 special assessment imposed upon him by the district court is unconstitutional. We have held that such assessments do not violate the Constitution. *See United States v. Herrada*, 887 F.2d 524 (5th Cir. 1989).

IV

For the foregoing reasons, the judgment of district court is

AFFIRMED.